

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PLANET AID, INC., et al.,

Plaintiffs,

v.

REVEAL, CENTER FOR  
INVESTIGATIVE REPORTING, et al.,

Defendants.

Case No. [17-cv-03695-MMC](#)

**ORDER DEFERRING RULING ON  
DEFENDANTS' MOTION FOR  
ATTORNEYS' FEES AND COSTS**

Before the Court is defendants Reveal, Center for Investigative Reporting, Matt Smith, and Amy Walters' "Motion for Attorneys' Fees and Costs," filed May 6, 2021. Plaintiffs Planet Aid, Inc. and Lisbeth Thomsen have filed opposition, to which defendants have replied, after which, with leave of Court, plaintiffs filed a surreply. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.<sup>1</sup>

On August 25, 2016, plaintiffs filed the instant action, alleging defendants published false and defamatory statements about plaintiffs. On July 2, 2018, defendants filed a "Special Motion to Strike Plaintiffs' Complaint," seeking an order dismissing the operative complaint in its entirety pursuant to section 425.16 of the California Code of Civil Procedure, California's "anti-SLAPP" statute.<sup>2</sup> By order filed March 23, 2021, the Court granted defendants' Motion to Strike and dismissed the above-titled action with

<sup>1</sup> By order filed August 19, 2021, the Court took the matter under submission.

<sup>2</sup> "Anti-SLAPP" is an acronym for "Anti-Strategic Lawsuit Against Public Participation." See Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 837 n.7 (9th Cir. 2001).

1 prejudice. On April 19, 2021, plaintiffs filed a notice of appeal from the order of dismissal,  
2 which appeal presently is pending before the Ninth Circuit.

3 By the instant motion, defendants seek a total of \$4,149,897.91 in attorney's fees  
4 and costs.<sup>3</sup> In opposing the motion, plaintiffs, at the outset, argue the Court "should defer  
5 determination of the amount of fees and costs—or deny the motion without prejudice to  
6 being renewed—until after the Ninth Circuit renders its decision [on their appeal]." (See  
7 Opp. at 6:22-24.)

8 An appeal from a decision on the merits does not foreclose an award of attorney's  
9 fees by the district court. See Masalosalo v. Stonewall Ins. Co., 718 F.2d 955, 957 (9th  
10 Cir. 1983) (holding district court "retained the power to award attorneys' fees after the  
11 notice of appeal from the decision on the merits had been filed"). The district court may,  
12 however, "in its discretion, 'rule on the claim for fees, [ ] defer its ruling on the motion, or  
13 [ ] deny the motion without prejudice, directing . . . a new period for filing after the appeal  
14 has been resolved.'" See G.P.P., Inc. v. Guardian Prot. Prods., Inc., No. 1:15-CV-00321-  
15 SKO, 2018 WL 932087, at \*2 (E.D. Cal. Feb. 16, 2018) (quoting Fed. R. Civ. P. 54(d)  
16 advisory committee's note to 1993 amendment).

17 "District courts have widely exercised their discretion to defer ruling on a motion for  
18 attorneys' fees or to deny the motion without prejudice pending an appeal on the merits."  
19 Freeman Inv. Mgmt. Co. v. Frank Russell Co., No. 13-CV-2856 JLS (RBB), 2017 WL  
20 11420268, at \*1 (S.D. Cal. Feb. 9, 2017). Where, for example, "the claim for fees  
21 involves substantial issues or is likely to be affected by the appellate decision, the district  
22 court may prefer to defer consideration of the claim for fees until after the appeal is  
23 resolved." See Fed. R. Civ. P. 58 advisory committee's note to 1993 amendment.

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26 <sup>3</sup> The amount appears to be primarily attributable to fees incurred in conducting  
27 discovery in connection with the Motion to Strike. (See Reply at 1:11-16); see also Cal.  
28 Code Civ. P. § 425.16(c)(1) (providing, "a prevailing defendant on a special motion to  
strike shall be entitled to recover his or her attorney's fees and costs"); Metabolife, 264  
F.3d at 845 (holding provision of California's anti-SLAPP statute staying discovery upon  
filing of anti-SLAPP motion inapplicable in federal court).

Here, plaintiffs argue, deferring resolution of the instant motion pending appeal is preferable, given the significant amount of fees requested and their challenge to what they describe as “the highly controversial application of California’s anti-SLAPP law in federal court.” (See Opp. at 1:15-17.) In that regard, plaintiffs point out that, after the Supreme Court’s ruling in Shady Grove Orthopedic Associations, P.A. v. Allstate Insurance Co., 559 U.S. 393 (2010),<sup>4</sup> the majority of circuits to have addressed the applicability of state anti-SLAPP statutes in federal court have held such statutes inapplicable.<sup>5</sup> Although the Ninth Circuit has found to the contrary, that determination was made before Shady Grove, see United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972-73 (9th Cir. 1999), and, as plaintiffs note, several Ninth Circuit judges, subsequent to Shady Grove, have opined that such determination should be reconsidered, see Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., joined by Kozinski J., Paez J., and Bea, J., dissenting from denial of rehearing en banc); CoreCivic Inc. v. Candide Grp. LLC, No. C-20-03792-WHA, 2021 WL 1267259, at \*3 (N.D. Cal. Apr. 6, 2021) (noting, “[o]ur own court of appeals . . . has not yet expressly decided how *Shady Grove* applies to a state anti-SLAPP statute”); see also La Liberté, 966 F.3d at 86-87 (finding California’s anti-SLAPP statute inapplicable in federal court; “disagree[ing]” with Newsham).

In response, defendants, citing Smith v. Payne, No. C 12-01732 DMR, 2013 WL 1615850 (N.D. Cal. Apr. 15, 2013), contend “it is . . . in the interest of judicial economy for

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<sup>4</sup> In Shady Grove, the Supreme Court set forth the following “framework” for resolving potential conflicts between state laws and the Federal Rules of Civil Procedure: a federal court “must first determine whether [the Federal Rule of Civil Procedure] answers the question in dispute[,] [and] [i]f it does, it governs—[state] law notwithstanding—unless it exceeds statutory authorization or Congress’s rulemaking power.” See Shady Grove, 559 U.S. at 396-97 (internal citation omitted).

<sup>5</sup> See La Liberté v. Reid, 966 F.3d 79, 87-88 (2d Cir. 2020); Klocke v. Watson, 936 F.3d 240, 245 (5th Cir. 2019); Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1357 (11th Cir. 2018); Los Lobos Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659, 673 (10th Cir. 2018); Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

1 this Court to rule on [d]efendants' Fee Motion now, so that any potential appeal of the fee  
 2 award can be combined with [p]laintiffs' appeal on the merits." (See Reply at 3:1-6); see  
 3 also Smith, 2013 WL 1615850, at \*2 (declining to defer ruling on motion for attorney's  
 4 fees and costs pending appeal of order granting anti-SLAPP motion).

5 In contrast to plaintiffs in the instant action, however, there is no indication the  
 6 plaintiffs in Smith made any showing as to the likelihood of reversal on appeal, and the  
 7 fees and costs sought therein, \$42,548.71, represents a very small fraction of the fees  
 8 and costs sought in the instant action. See Smith, 2013 WL 1615850, at \*1-2.

9 Consequently, although it often is preferable to have "all issues arising out of a single  
 10 lawsuit . . . considered in one appellate proceeding," see Metcalf v. Borba, 681 F.2d  
 11 1183, 1188 (9th Cir. 1982), in this instance, the circumstances warrant a different finding.

12 In particular, there being no suggestion that any party would be harmed by a delay  
 13 in resolving the instant motion, and given the substantial showing plaintiffs have made as  
 14 to the potential for reversal of the judgment on which defendants' entitlement to fees is  
 15 predicated, see Automotive Techs. Int'l, Inc. v. Delphi Corp., No. 08-11048, 2011 WL  
 16 13209069, at \*3 (E.D. Mich. June 16, 2011) (noting, "[t]here is no reason to render a  
 17 decision on fees when key elements of the fee calculus[,] including which party is the  
 18 prevailing party . . .[,] will be informed by the appellate outcome"), as well as the "bone-  
 19 crushing labor required to vet the large amount of fees requested," see CoreCivic, 2021  
 20 WL 1267259, at \*1, \*6 (deferring calculation of attorney's fees and costs pending  
 21 appeal),<sup>6</sup> the Court finds the balance of considerations weighs in favor of deferral pending  
 22 the Ninth Circuit's determination as to whether, in light of Shady Grove, California's anti-  
 23 SLAPP statute applies in federal court.<sup>7</sup>


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 25 <sup>6</sup> The opening brief on appeal in CoreCivic, filed August 16, 2021, addresses at  
 26 considerable length the issue of whether California's anti-SLAPP statute applies in  
 federal court. See Principal Br. of Pl.-Appellant CoreCivic, Inc. at 31-50, CoreCivic, No.  
 20-17285 (9th Cir. Aug. 16, 2021).

27 <sup>7</sup> The Court notes that some district courts, in deciding whether to stay post-  
 28 judgment calculation of attorney's fees and costs pending appeal, have applied the  
 factors set forth in Hilton v. Braunskill, 481 U.S. 770 (1987), or Landis v. North American

Accordingly, the Court's ruling on defendants' Motion for Attorneys' Fees and Costs is hereby DEFERRED pending the Ninth Circuit's determination as to whether California's anti-SLAPP statute applies in federal court. For administrative purposes, the Motion is hereby terminated without prejudice to renoticing as appropriate.

**IT IS SO ORDERED.**

Dated: August 27, 2021

  
MAXINE M. CHESNEY  
United States District Judge

United States District Court  
Northern District of California

Co., 299 U.S. 248 (1936), and have disagreed as to which set of factors applies. Compare Green v. Kanazawa, Nos. 16-00054 & 16-00055, 2018 WL 6592045, at \*1-2 (D. Haw. July 2, 2018) (applying Landis factors), with Personal Web Techs., LLC v. EMC Corp., No. 13-cv-01358-EJD, 2020 WL 1557441, at \*1 (N.D. Cal. Apr. 1, 2020) (applying Hilton factors). In this instance, however, under either test, the Court's decision, as set forth above, would remain unchanged.